

# United States Senate

WASHINGTON, DC 20510

July 6, 2017

Acting Commissioner Kevin McAleenan  
United States Customs and Border Protection  
1300 Pennsylvania Avenue, NW  
Washington, D.C. 20229

Dear Acting Commissioner McAleenan:

Congratulations on your nomination to be Commissioner of U.S. Customs and Border Protection (CBP). We look forward to hearing from you during the confirmation process. We write today to emphasize the importance of full compliance with the Enforce and Protect Act (EAPA) of 2015 (Title IV of P.L. 114-125) as part of the Administration's push to improve antidumping and countervailing duty collection. We are concerned that CBP's Interim Final Rule (19 CFR Part 165), published August 22, 2016, will undermine CBP's efforts to address duty evasion.

We are pleased that the Administration has taken steps to address the under-collection of antidumping and countervailing duties. The President's Executive Order on Establishing Enhanced Collection and Enforcement of Antidumping ("AD") and Countervailing Duties ("CVD") and Violations of Trade and Customs Law follows the legislative language included in the Trade Facilitation and Trade Enforcement (TFTEA) Act to establish an Import Risk Assessment Program. We supported this TFTEA provision, and we are appreciative that the Administration shares our view that duty collection in antidumping and countervailing duty cases is critical to ensuring U.S. companies and workers get the relief from trade remedies that they deserve.

Under-collection of AD/CVD duties, however, is just one way in which foreign competitors undermine U.S. trade laws. Duty evasion, which occurs when imports avoid AD/CVD duties because they enter the U.S. as goods that are not covered by AD/CVD cases, remains a major challenge for U.S. manufacturers. Congress passed the Enforce and Protect Act in 2016 to strengthen CBP's enforcement efforts against duty evasion. We are concerned that CBP's Interim Final Rule ("rule") and implementation of the Enforce and Protect Act are inconsistent with the spirit of the Executive Order and Congress' intent and will weaken efforts to address duty evasion.

First, the rule does not establish an administrative protective order (APO) process for duty evasion cases. The APO process is used by the Department of Commerce in antidumping and countervailing duty proceedings. It is also used by the Federal Communications Commission and the Federal Energy Regulatory Commission. An APO process facilitates the exchange of business confidential information and allows outside counsel for parties to file, view, and search documents in trade cases. By allowing counsel to view such information under the constraints of a protective order, an APO process protects confidential information from public disclosure

while also providing a high level of transparency to interested parties by ensuring that their legal representatives can view the data upon which CBP will base its determinations. Without an APO process, duty evasion investigations will not be transparent for stakeholders, and CBP will not receive the benefit of knowledgeable commentary and argumentation by representatives of all parties to the investigation. We ask you to establish an APO process for duty evasion proceedings to ensure maximum participation and accessibility.

Second, we are concerned that the rule uses the phrase “parties to the investigation” to include only the filer of the allegation and the alleged evader. The term “parties to the investigation” is not included in the law. In fact, Congress explicitly intended for a much broader group of stakeholders to be able to participate in duty evasion proceedings. In Section 421 of the EAPA, Congress defined “interested parties” to include a foreign manufacturer, U.S. importer, a U.S. manufacturer or producer, a union or group of workers, and a trade or business association. By limiting the process to “parties to the investigation,” the rule and CBP’s practice are at odds with Congress’ objectives. We urge you to revise the rule so that it reflects the law and allows all the stakeholders enumerated in the law to participate in the proceedings.

Third, it is imperative that CBP accept an allegation of duty evasion even if the importer is unknown. The rule’s standards require an allegation of evasion to include the “name and address of importer against whom the allegation is brought.” This requirement is not substantiated in the EAPA. The statute mandates that an allegation include only the “information reasonably available to the party that filed the allegation.” The importer is often unknown to stakeholders, and mandating the inclusion of this information will significantly limit the number of duty evasion cases that can be successfully filed. We urge you to rescind this requirement to guarantee that all allegations that have fulfilled the statutory requirements will be properly evaluated by CBP.

Fourth, CBP’s infrequent notifications during duty evasion proceedings has made it difficult for interested parties to follow the status of an investigation. EAPA did not include specific requirements for public disclosure of status updates, but improved communication with interested parties is necessary to ensure effective duty evasion enforcement. We ask you to formally adopt disclosure standards that require CBP to publicly announce when key steps in an investigation are made to enhance transparency and accountability in proceedings.

Finally, the discussion that accompanied the rule states that CBP will “strive to ensure compliance” with the statutory deadlines imposed by Congress. EAPA explicitly provides up to 300 calendar days for the completion of an investigation after its initiation date. It also allows an extension of up to 60 calendar days if the Commissioner determines such extension is necessary under limited circumstances. Complying with the statutorily mandated timelines is necessary to improve the effectiveness of CBP’s AD/CVD collection efforts. The language noted above raises doubts about whether CBP will adhere to the statute’s deadlines, and we urge CBP to clarify that it will follow the law and complete investigations within the required period of time.

We strongly supported provisions in the TFTEA that would improve duty collection in antidumping and countervailing duty cases. We also insisted on the inclusion of the Enforce and Protect Act to improve the process by which duty evasion allegations are accepted, considered,

and completed. We are pleased that the Administration agrees with these priorities and is placing an emphasis on duty collection; however, duty evasion must also be a top priority to ensure U.S. manufacturers get needed relief from unfair trade practices. CBP's rule implementing the Enforce and Protect Act is inconsistent with Congress' intent and falls short of what is needed and to make the duty evasion process more transparent, timely, and accessible to stakeholders. We urge you to issue a revised rule that addresses the concerns outlined above to ensure all U.S. workers and companies who are affected by unfair trade practices get the relief they deserve.

Thank you for your consideration of this letter, and we look forward to working with you and President Trump to improve duty collection and enforce U.S. trade laws.

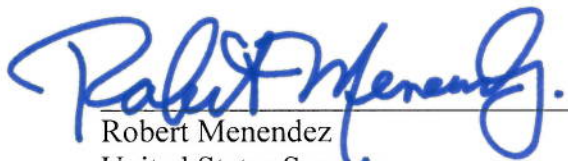
Sincerely,



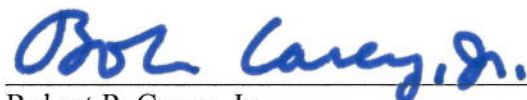
Sherrod Brown  
United States Senator



Rob Portman  
United States Senator



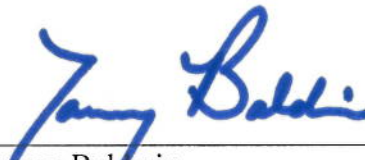
Robert Menendez  
United States Senator



Robert P. Casey, Jr.  
United States Senator



Richard Burr  
United States Senator



Tammy Baldwin  
United States Senator



Claire McCaskill  
United States Senator



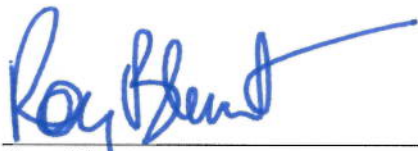
Amy Klobuchar  
United States Senator



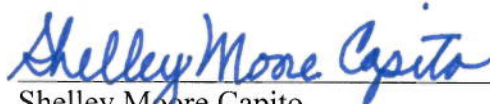
Debbie Stabenow  
United States Senator



Al Franken  
United States Senator



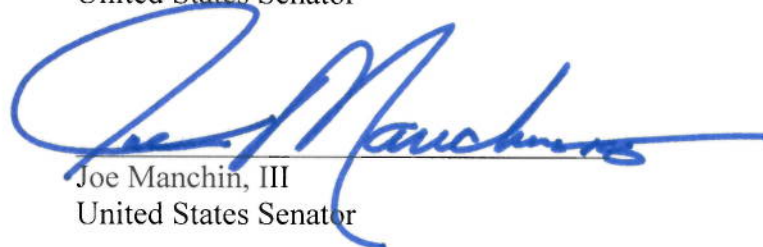
Roy Blunt  
United States Senator



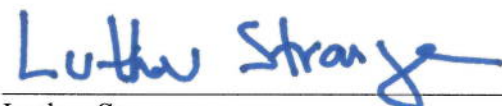
Shelley Moore Capito  
United States Senator



Joe Donnelly  
United States Senator



Joe Manchin, III  
United States Senator



Luther Strange  
United States Senator